No. 70-250



# In the Supreme Court of the United States

OCTOBER TERM, 1971

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ROBERT B. CARLESON, ET AL., APPELLANTS

*v.*

NANCY REMILLARD, ET AL.

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA*

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## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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# INDEX

Cases:



Statutes and regulations:

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1. The Federal Aid to Families with Dependent Children ("AFDC") program, 42 U.S.C. 601-610, is one of six federally-aided public assistance programs established by the Social Security Act for various categories of needy persons.[1] Each of these pro-

[1] These programs are: Grants to States For Old-Age Assistance and Medical Assistance for the Aged, 42 U.S.C. 301,

grams is jointly financed by the states and the federal government and administered by the individual states or by political subdivisions under the supervision of the state. It is optional with each state whether it wishes to participate in any or all of the programs. If a state chooses to participate in one of the programs, it submits a plan of administration to the Secretary of Health, Education, and Welfare; if the plan meets the requirements set forth in the pertinent title of the Social Security Act, the Secretary approves the plan. The federal government then provides matching grants-in-aid to the state within the limits of the provisions of the Social Security Act setting forth the scope of federal financial participation.

For AFDC, the requirements for obtaining the Secretary's approval of a state plan are contained in Section 402 of the Social Security Act, 42 U.S.C. 602. Sections 406, 407, and 408 of the Act, 42 U.S.C. 606, 607, 608, define the class of persons in whose behalf the state may receive federal matching funds under the AFDC program. Section 402(b) provides that the Secretary "shall approve" any plan which fulfills the conditions specified in Section 402(a). One of those conditions is that AFDC "shall be furnished with

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*et seq.*; Aid to Families with Dependent Children, 42 U.S.C. 601-610; Grants to States For Aid to the Blind, 42 U.S.C. 1201, *et seq.*; Grants to States For Aid to the Permanently and Totally Disabled, 42 U.S.C. 1351, *et seq.*; Grants to States for Aid to the Aged, Blind, or Disabled, 42 U.S.C. 1381, *et seq.*; Grants to States For Medical Assistance Programs, 42 U.S.C. 1396, *et seq.*

reasonable promptness to all eligible individuals." Section 402(a)(10), 42 U.S.C. 602(a)(10). Under this requirement, a state plan may not contain an "eligibility standard that excludes persons eligible for assistance under federal AFDC standards." *Townsend* v. *Swank*, No. 70-5021, decided December 20, 1971, slip op., p. 4.

*Carleson* is a class action by a two-year-old child and her mother, whose husband is away from home on active duty in the United States Army, challenging the validity of California's Department of Social Welfare Regulation EAS § 42-350.11. California incorporates in its AFDC eligibility provisions the "continued absence" concept of the Social Security Act, under which a needy child "deprived of parental support * * * by reason of the * * * continued absence from the home * * * of a parent" may be considered eligible for AFDC benefits. California Social Welfare Regulations EAS § 42-350.11 excludes absence due to "active duty in the Armed Services" from the definition of "continued absence" which California uses to test eligibility for AFDC benefits.[2] The majority of the three-judge court (Judge Conti dissenting) upheld the plaintiffs' contention that the Social Security Act does not permit a state to exclude as a group dependent children whose parents are absent due to military service, though it indicated that the

[2] At least 7 other states expressly deny AFDC where absence is due to military service. At least fourteen more states informally restrict AFDC payments in such cases. See *Stoddard* v. *Fisher*, 330 F. Supp. 566, 568 n. 2 (D. Maine).

state could provide for a case-by-case factual determination as to whether military service creates the need required to justify the payment of AFDC benefits.[3]

2. Before the Court noted probable jurisdiction in this case, the United States submitted, at the Court's invitation, a brief *amicus curiae* suggesting that this case and its companion, *Digesualdo* v. *Shea*, No. 70-5305, raised substantial questions of federal law warranting plenary consideration, but suggesting that the Court withhold disposition of these cases pending its decision in *Townsend* v. *Swank*, No. 70-5021, and *Carter* v. *Stanton*, No. 70-5082. With respect to the merits of *Carleson* and *Digesualdo*, we reiterated the position that we had previously taken in our brief *amicus curiae* in *Townsend*, *i.e.*, that the state restrictions on AFDC eligibility were valid, and that the Social Security Act does not require the states to provide AFDC benefits for all persons with respect to whom federal matching payments can be made.

On December 20, 1971, this Court rendered its decision in *Townsend*. The Court held that the Illinois regulation precluding the payment of AFDC benefits to 18-20 year-old children attending college, for whom federal matching funds had been made available through amendment to the Social Security Act, was invalid.

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[3] The court declined to rule on plaintiff's constitutional attack on the California regulation, though it noted that the "interpretation of § 606 urged by California would raise serious questions under the equal protection and due process clauses of the Constitution" (J.S. App. 4).

On January 10, 1972, the Court ordered that the judgment in *Digesualdo*, which, like *Townsend*, involved a limitation on AFDC assistance based on age and school attendance, be vacated and that the case be remanded for further consideration in light of *Townsend*. At the same time the Court noted probable jurisdiction in the instant case.

This memorandum sets forth our view that *Townsend* ought not be applied to invalidate California's preclusion of AFDC benefits to families in which the parent is absent because of military service.

3. In *Townsend* v. *Swank*, after noting that children aged 18 to 20 attending college are eligible to receive federal matching funds under Section 406 (a) (2) (B) of the Social Security Act, the Court stated (slip op., p. 4):

> [A]t least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.

Another eligibility criterion for federal matching funds set forth in Section 406(a)(2) of the Social Security Act is the "continued absence" of a parent from the home. The Department of Health, Education, and Welfare has in the past allowed the states considerable discretion in determining what kinds of continued parental absence will result in AFDC eligi-

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# CARD 5

bility.[4] Thus, although the Department has read the term "continued absence" to permit the payment of federal matching funds to families in which the requisite parental absence is due to military service, the Secretary has approved state plans such as California's, under which families in this category are not eligible for AFDC benefits.

In spite of the language in *Townsend* indicating that state AFDC plans are required to include persons eligible to receive federal matching funds, we believe that the California AFDC limitation under consideration in this case is distinguishable from the limitation held invalid in *Townsend*, and that the Court's holding in *Townsend* does not require the Court to hold the California provision invalid. The basic distinction between the two cases is that the restriction on aid to 18-20 year-old college students held invalid in *Townsend* conflicts with a provision of the Social Security Act which specifically declares persons in

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[4] The Department's regulations for federal matching provide that:

> Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child. If these conditions exist, the parent may be absent for any reason, and he may have left only recently or some time previously. [45 C.F.R. 233.90(c)(1)(iii).]

that category eligible for federal matching funds. In the Court's view, this specific provision reflects Congress' conclusion that the states should have no discretion to provide assistance to a class of children more narrowly defined in terms of age and school attendance.

In contrast to the specific provisions defining the age and school attendance aspects of AFDC eligibility, the Social Security Act does not elaborate on the scope of the term "continued absence." In our view, Congress' failure to define the federal standard applicable to this aspect of AFDC eligibility indicates that the states were intended to have considerable discretion in determining what sort of parental absence justifies AFDC assistance. Furthermore, the Court in *Townsend* found the Illinois restriction on AFDC in conflict with the Social Security Act not only because of the specific language in the Act covering the omitted category of children, but also because the legislative history of the amendment to the Act adding 18-20 year-old college students, in the Court's view, indicates a clear Congressional intent to require the states to provide assistance to the newly qualified class. By contrast, there is virtually no legislative history indicating either the scope of the federal standard of "continued absence" or whether the states are required to incorporate into their AFDC plans the broadest permissible reading of the term as used in the Social Security Act.[5]

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[5] The only indirect reference to the continued-absence criterion in the legislative history of the Social Security Act is a

4. If the Court construes *Townsend* to require states to extend AFDC coverage to all classes of persons for whom federal matching funds are available, even where the Social Security Act provides only a broad general standard of eligibility, the impact on the administration of the Act would be substantial. There are numerous general terms like the term "continued absence" involved here in the provisions of the Act setting forth eligibility criteria for federal matching funds, and if all state plans are required to implement these terms by providing coverage to the largest class of persons with respect to whom HEW approves the payment of federal matching funds, HEW believes that nearly every state plan will be in-

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statement by Senator Harrison, Chairman of the Senate Finance Committee:

> A State will not have to aid every child which it finds to be in need. Obviously, for many States that would be too large a burden. It may limit aid to children living with their widowed mother, or it can include children without parents living with near relatives. The provisions are not for general relief of poor children but are designed to hold broken families together. [79 Cong. Rec. 9269 (1935).]

Although Senator Harrison's comment suggests a legislative sanction of state AFDC plans which make no provision at all for assistance to children deprived by reason of a parent's continued absence or his incapacity (as opposed to his death), this statement antedated Congress' decision to add what is now section 402(a)(10), 42 U.S.C. 602(a)(10), to the Social Security Act. That provision requires that AFDC "shall be furnished with reasonable promptness to all eligible individuals," and its addition may have altered the degree of permissible state discretion in implementing the definitional provisions of the Act. See *infra*, p. 9.

valid. This may well include not only AFDC plans, but state plans for administering the other public assistance programs established by the Social Security Act.

Each of the public assistance titles of the Act shares a common structure, in that each title contains a list of required state plan provisions,[6] as well as a set of definitional provisions setting forth the circumstances in which federal matching funds are available.[7] Moreover, each title contains the requirement, cited by the Court in *Townsend*, see slip opinion p. 5, in support of its holding that the age and school attendance eligibility provisions under consideration in that case were binding on the states, that assistance "shall be furnished with reasonable promptness to all eligible individuals."[8] In our view, therefore, application of the *Townsend* decision to this case could have a significant impact on the degree of flexibility HEW allows to the states in implementing numerous definitional provisions of the Act. These would include, for example, "physical or mental incapacity" of a parent under the AFDC title,[9] "blind" under the Aid for the Blind program,[10] "permanently and totally disabled" under the Aid for the Perma-

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[6] 42 U.S.C. 302, 602, 1202, 1352, 1382, 1396a.

[7] 42 U.S.C. 306, 606, 607, 608, 1206, 1355, 1385, 1396d.

[8] 42 U.S.C. 302(a)(8), 602(a)(10), 1202(a)(11), 1352(a)(10), 1382(a)(8), 1396a(a)(8).

[9] 42 U.S.C. 606(a).

[10] 42 U.S.C. 1201, *et seq.*

nently and Totally Disabled program,[11] the term "medical assistance" as used in the context of the medicaid program,[12] and many other areas in which HEW now allows the states discretion in providing assistance.

In our view, a sweeping change of this magnitude in the administration of the Social Security Act and the relationship of federal eligibility provisions to state plans is more appropriately left to the Congress. Indeed, the welfare reform bill currently under consideration in Congress, H.R. 1,[13] contains uniform provisions establishing federal eligibility criteria for assistance to needy families and to the needy aged, blind, and disabled.

5. Accordingly, we believe that the California regulation precluding AFDC assistance to families in which parental absence is due to military service ought to be judged according to the standard which HEW has traditionally applied in approving state plans; thus, if the classification reflected in the regulation is reasonable and not inconsistent with the purposes of the Act, the regulation ought to be held valid. We believe that the regulation reflects California's view that AFDC is designed primarily to assist families in which parental absence represents not simply a temporary physical separation of parent and child,

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[11] 42 U.S.C. 1351, *et seq.*

[12] 42 U.S.C. 1396, *et seq.*

[13] This bill has been passed by the House and is now being considered by the Senate Finance Committee.

but "a substantial severance of marital and family ties that deprives the child of at least one of its natural parents." Cal. Dep't. of Soc. Wel. Reg. EAS § 42-350.1. In California's view, such a severance exists where there is a "definite interruption of or marked reduction in marital * * * responsibilities and relationships compared to previously existing conditions." *Id.* Thus California excludes from its AFDC program children whose parents are away from home in connection with current or prospective employment, and military service is considered for these purposes a type of employment. Cal. Dept. of Soc. Wel. Reg. EAS § 42-350.11.

Although HEW encourages states to include dependent children whose parents are absent due to military service in their AFDC plans,[14] and recognizes the serious financial difficulties faced by many servicemen's families, we believe that California has made a reasonable judgment that absence due to employment, including military service, is not ordinarily as disruptive of the family structure and not as likely to result in the child's being deprived of parental support as absence due, for example, to parental desertion. Moreover, we believe that the regulation may also reflect California's view that the financial problems generated by absence of a parent due to military service are more properly the responsibility of the military pay and allotment system. We believe that both of these considerations are reasonable, and that

[14] See HEW, Handbook of Public Assistance Administration, Part IV, § 3422.2.

the regulation is not an abuse of California's discretion to define AFDC eligibility.

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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